No. 82-1651

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

CRISPUS NIX, WARDEN OF THE IOWA STATE PENITENTIARY,
Petitioner,

vs.

ROBERT ANTHONY WILLIAMS,
Respondent.

PETITIONER'S REPLY BRIEF

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Petitioner Crispus Nix, Warden of the Iowa State Penitentiary, respectfully submits this Reply Brief in support of his Petition for Certiorari in the above captioned matter filed on April 7, 1983.

SUMMARY OF ARGUMENT

1. Respondent Mischaracterizes the Opinion in *Stone* v. *Powell,* 428 U.S. 465 (1977) as Strictly Limiting its Holding to Fourth Amendment Cases When in Fact the Words of Limitation Focus on the Character of the Evidence Involved.

2. Respondent Cannot Reasonably Assert That the Question of "Lack of Bad Faith" Was Actually Litigated in the Federal District Court Habeas Proceeding Where the Issue was not Remotely Raised in the Pleadings, was not the Subject of An Evidentiary Hearing, and was not Mentioned in Respondent's Post Trial Memorandum.

3. Notwithstanding Harsh Rhetoric of Respondent, A Strong Case Can Be Made Under Several Respectable Theories That the Inevitable Discovery Exception May Be Properly Invoked by the State in This Case.

ARGUMENT

1. **Respondent Mischaracterizes the Opinion in *Stone* v. *Powell* as Strictly Limiting its Holding to Fourth Amendment Cases When in Fact the Words of Limitation Focus on the Character of the Evidence Involved.**

Respondent and thirty-eight amici states urge certiorari be granted to consider the important question of whether the rule in *Stone* v. *Powell*, 428 U.S. 465 (1977) should be extended to a case involving collateral attack of a conviction based in part on highly probative and reliable evidence gathered in violation of the Sixth Amendment but which has been freed from taint by the inevitable discovery exception to the exclusionary rule. Respondent challenges the theory primarily on the ground that the rule in *Stone* v. *Powell* is strictly limited to Fourth Amendment cases.[1] Respondent's Brief in Opposition to Certiorari at 23-24 (hereinafter cited as Respondent's Brief) The quotations from *Stone* recruited by Respondent to support this proposition, however, are highly distorted and not presented in proper context.

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[1] In addition, Respondent asserts that Williams was denied a full and fair opportunity to litigate the question of the admissibility of the evidence in state court. Respondent's Brief at 27. No such finding has been made below, however, and the issue is thus not properly before the Court. In any case, the contention is frivolous. No procedural bar prevented effective state court challenge. And even conceding arguendo that the trial court feared reversal on appeal, Respondent's Brief at 27. this fact alone hardly establishes bias or prejudice.

For instance, Respondent claims that *Stone* v. *Powell* indicates that "denials of Fifth and Sixth Amendment rights are different in kind from Fourth Amendment violations in that they direct by impugn the integrity of the judicial process. 428 U.S. at 479." Respondent's Brief at 24. This is not a fair rendition of the cited passage of the opinion, which generally distinguishes Fourth Amendment claims from Fifth and Sixth Amendment violations because Fourth Amendment infractions do not "*impugn the integrity of the fact finding process or challenge evidence as inherently unreliable* ...." 428 U.S. at 479 (emphasis supplied). Clearly, the Respondent's challenge to the admission of highly reliable and probative evidence in this case does not "impugn the integrity of the fact finding process or challenge evidence as inherently unreliable." *Id.* Moreover, the dead body of Pamela Powers and her physical condition upon discovery have not been altered or affected one iota by police conduct in this case.

Respondent also attempts to undermine this Court's earlier observation in this case and the contention of thirty eight amici states that Williams' guilt "was not in question." Respondent's Brief at 26, citing *Brewer* v. *Williams*, 430 U.S. at 428, 437, 441 (1977) and Illinois *Amicus* Brief at 9. Respondent observes that "the Court of Appeals specifically noted that at the second trial, Williams' defense—that someone else killed the victim and placed her body in his room—was supported by substantial physical and scientific evidence indicating, *inter alia*, that the perpetrator, unlike Williams, was sterile." Respondent's Brief at 26.

Respondent also asserts that the record does not show that the victim's body would have been found if Respondent's constitutional rights had not been violated. Respondent's Brief at 19-23. Since this issue was not addressed by the Court of Appeals, it too is not properly before the Court. In any case, the state trial count's factual finding in the affirmative on this issue would be entitled to a presumption of validity, 28 U.S.C. §2254(d).

Of course, neither this Court, nor the Court of Appeals, nor the Federal District Court, sits to review the evidence *de novo*. But it should be noted that nothing occurred at the second Williams trial to suggest that the evidence in question was not highly reliable and probative with respect to the issue of the guilt of the accused. The body of Pamela Powers demonstrated beyond peradventure that she was in fact dead, had been a homicide victim, and was sexually assaulted before her death.[2]

Respondent attempts to conscript *Rose* v. *Mitchell*, 443 U.S. 549 (1979) in support of his narrow reading of *Stone*. But *Rose* is hardly a strong reaffirmation of the limited reach of *Stone*.

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[2] At his second trial, defense counsel argued that Williams' was somehow set up by a mystery man who left the body in Williams' YMCA room. But this naked argument — obviously rejected by the jury — was not supported by Williams, who declined to take the stand, or by any other witness.

Much has been made by the Respondent, and by the Court of Appeals, of the lack of spermatozoa in the body of Powers, raising an implication that Williams, who was virile, could not have been the attacker. Respondent's Brief at 26. An expert urologist for the State, however, testified that there were a number of other potential explanations for the phenomenon besides sterility of the attacker. (Trial Tr. at 283-88).

Respondent finally grasps in a footnote for the deposition of Richard Baucher. Respondent's Brief at 27 n.14. According to Respondent, Baucher's deposition suggested the possibility that Bowers, a dead man, was the perpetrator of the crime. Respondent opines that the Baucher testimony was inexplicably not offered at trial. *Id.*

But the failure to present Baucher's testimony appears to have been the result of a strategic decision by counsel. Claims that a dead man committed a crime often do not sit well with juries. And, while it is not part of the record since the Baucher testimony was not introduced, the State exhumed the body of Bowers and was prepared to offer medical testimony to show that Bowers, like Williams, was *virile*. The defense thus could not claim that Williams could not have committed the crime because he was virile, and simultaneously point an accusing finger at the also virile Bowers.

Respondent's Brief at 25. Aside from the clear distinctions between *Rose* and the case at bar already pointed out, *see* Petition for Certiorari at 15, it should be noted that the section of the Court's opinion in *Rose* declining to extend *Stone* was supported only by a bare 5-4 majority of the Court. For at least one member of the majority, the century long history of federal intervention on this issue, 443 U.S. at 545, absent here, was a crucial factor. *See* Stevens, J. dissenting in part, at 443 U.S. 594.

2. **Respondent Cannot Reasonably Assert That The Question Of "Lack Of Bad Faith" Was Actually Litigated In The Federal District Court Habeas Proceeding Where The Issue Was Not Remotely Raised In The Pleadings, Was Not The Subject Of An Evidentiary Hearing, And Was Not Mentioned In Respondent's Post Trial Memorandum.**

Respondent apparently does not claim that the issue of whether "lack of bad faith" on the part of law enforcement officers must be established before the State can invoke the inevitable discovery exception to the exclusionary rule was not in issue in the state trial court. Respondent does boldly assert, however, that the State "had ample notice" that the issue of good faith was being litigated in the habeas proceeding in the District Court. Respondent's Brief at 9.

Examination of the Respondent's pleadings in the habeas proceeding conclusively demonstrates that this contention is without merit. The pleadings simply contain no mention of the lack of bad faith issue at all, directly or by implication. For the convenience of the Court, the entire text of Respondent's pleading with respect to inevitable discovery in the federal habeas proceeding is presented here:

> 18. The Iowa trial court's application of the "inevitable discovery" rule violated Petitioner's rights under the Fifth, Sixth, and Fourteenth Amendments to the United States Constitution in that:

a. The "inevitable discovery" rule applied by the Iowa courts is itself violative of the Fifth, Sixth, and Fourteenth Amendments;

b. In requiring the prosecution to show only by a preponderance of the evidence, that the body would have been discovered "in any event", the Iowa courts used an inadequate burden of proof;

c. The Iowa courts erred in finding that the prosecution had met even the preponderance of the evidence burden.

Respondent's Supplemental Petition, at 3 (Reply Appendix A).

The pleadings fairly raised the question of whether the inevitable discovery exception exists at all, whether the prosecution needs to show only by a preponderance of evidence that the body would have "in any event" been discovered, and whether the prosecution met even a preponderance of the evidence burden. But there is plainly no suggestion that the Respondent was challenging the conviction on the ground that the State failed to show "lack of bad faith" on the part of law enforcement officials.

The issue was not raised in the Federal District Court pleadings notwithstanding the fact that the Iowa Supreme Court flagged "lack of bad faith" as a potential issue. The failure to raise the issue in the pleadings is particularly significant where the Respondent is represented by highly sophisticated counsel.[3] The most obvious conclusion is that everyone on both sides though good faith was not an issue because of the close division of the best legal minds on the question.

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[3] Throughout the present habeas proceeding, Williams has been represented by a Professor of Criminal Law at the University of Iowa (now at the University of Arizona) and by the Prisoner Assistance Clinic of the College of Law at the University of Iowa.

Given this state of the record, it is not surprising that the District Court made no finding on the lack of bad faith issue. The question simply was not litigated. Thus, the Eighth Circuit's observation that a finding of good faith is "utterly without record support", *Williams* v. *Nix*, 700 F.2d at 1170 (8th Cir. 1983) (Pet. at A11-A12), is hardly an indictment, but is the natural outcome of a properly focused habeas proceeding limited to claims actually presented to the Court.

Respondent post hoc attempts to raise the issue omitted from the pleadings after its surprising resurrection in the Court of Appeals cannot be based on citations to briefs before the District Court. The first passage cited by Respondent is simply a description of the holding of the Iowa Supreme Court. Respondent's Brief at 6-7 (citing "memorandum filed March 30, 1981," p. 21). It is totally devoid of legal argument with respect to lack of bad faith. The second citation is to a part of the brief which questions whether the inevitable discovery exception to the exclusionary rule exists *at all*. The argument presented here was that speculation of what would have been discovered cannot *ever* constitutionally free evidence from the taint of underlying illegality. *Id.* at 7 (March 30, 1981 Memorandum at 25.) These passages in briefs can hardly be considered an amendment to the pleadings sufficient to raise the question of whether in this case, Detective Leaming acted with "a lack of bad faith."

Indeed, if anything, Respondent's briefing demonstrates that the Respondent himself did not even believe the issue was fairly raised. The State admittedly put on no evidence at the habeas proceeding on the lack of bad faith issue. If Respondent believed the issue was fairly raised and was confronted with such a complete failure to contest the issue, one would expect the Respondent's Post Hearing Memorandum to pounce on the issue. But not one word on the issue — *not one word* — is contained in the Respondent's Post Hearing Memorandum. *See* Petitioner's Post Hearing Memorandum, pp. 1-13 inclusive (Reply Appendix B). Obviously, Respondent, like the State and like the District Court, did not believe the issue had been litigated.

Because the Court of Appeals reached out to reverse the District Court's denial of habeas on an issue not actually litigated below, the judgment should be reviewed through exercize of this Court's habeas jurisdiction.

3. Notwithstanding Harsh Rhetoric Of Respondent, A Strong Case Can Be Made Under Several Respectable Theories That The Inevitable Discovery Exception May Be Properly Involved In This Case.

Respondent goes to great length to trivialize the Petitioner's contention that the inevitable discovery rule should apply in this case. While full presentation of the dimension of this question must await review on the merits, several rebuttal points may assist the Court in determining whether to exercize its certiorari jurisdiction.

Though Leaming was found by this Court to have crossed the constitutional line in statements he made to Williams, *Brewer* v. *William*, 430 U.S. 387 (1977) there is already substantial evidence in the record (which could have been buttressed by Leamings own tsetimony if the state had received a fair opportunity to do so) that Leaming thought he was acting constitutionally. Certainly an inference can be made that where even learned judges are in doubt, it is unlikely that Leaming *knew* he was acting unconstitutionally. In addition, Leaming carefully avoided questioning the accused, thus attempting to conform to *Miranda* strictures. If he did not respect constitutional restraints, he would have shown no such inhibitions. *See* Petition for Certiorari at 10.

Respondent repeatedly claims that Leaming agreed not to interrogate Williams. The citations do *not* support the assertion. Nowhere in the record is there any suggestion that Leaming *himself* agreed to anything. Police officials in Des Moines agreed, with Williams attorney via telephone, not to interrogate the accused when in transit between Davenport and Des

Moines, but Leaming, who may not have had full knowledge of the agreement, clearly expressed reservations when defense counsel demanded his acquiescience. *See Brewer* v. *Williams*, 430 U.S. at 391-92.

In any case, a substantial case can be made that Leaming thought his subsequent activities—in which he carefully aavoided direct questioning of the accused—were consistent with the constitution *and* whatever agreement was either present or to which Leaming had knowledge.

Respondent claims that it cannot possibly be said that Leaming acted in good faith because of the existence prior to his questionable actions of *Massiah* v. *United States*, 377 U.S. 201 (1964). This argument is without merit. In *Massiah*, the accused had absolutely *no* idea that the infiltrant was a police officer. *Massiah* is thus plainly and materially distinguishable on its facts.

Finally, Respondent contends no split exists in the circuits on the question of whether good faith must be established to invoke the inevitable discovery exception. It is claimed that the good faith issue was not raised in the cases cited as conflicting in the Petition for Certiorari. Respondent's Brief at 13. Petitioner does not have access at present to the pleadings at the Federal District Court level in these cases. If the pleadings resemble that of Respondent in this case, *see* page 6 *supra*, the point may be well taken. But even assuming arguendo no conflict technically exists, the sweeping and unqualified language in some of the opinions, *see United States* v. *Brookings*, 614 F.2d 1037, 1042 n.2 (5th Cir. 1980) (inevitable discovery requires "*simply* a reasonable probability that the evidence in question would have been discovered in any event other than by the tainted source." emphasis supplied) will present an apparent conflict to the federal trial bench seeking appellate guidance.

CONCLUSION

For the above reasons, and for the reasons cited in the Petition for Certiorari, the Petitioner respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Court of Appeals.

Respectfully submitted,

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